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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 592

WABASH RAILROAD COMPANY, a Corporation,
Petitioner,

v.

CLOYD WEHRLI,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Missouri.

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Respondent, Cloyd Wehrli, respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari to the Supreme Court of Missouri in the above case. In this behalf, respondent shows unto the Court the following:

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Missouri is officially reported as Cloyd Wehrli, Respondent, v. Wabash Railroad Company, a corporation, Appellant, 315 S. W. 2d 765.

QUESTIONS PRESENTED.

1. Whether the decision of the Supreme Court of Missouri is correct and is in accord with the applicable decisions of this Court in holding that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing respondent's injury where the evidence showed: that respondent, while operating a railroad motor car was struck by an automobile at an admittedly dangerous crossing where petitioner had installed protective electric signal devices to prevent such collisions; that petitioner insulated respondent's motor car so as to prevent it from activating the signals (which admonished motorists to "Stop on Red Signal"), and that petitioner did not furnish any other devices to activate the signal; that the motorist relied on the non-operation of the signals in proceeding onto the tracks; and where the evidence further showed, through testimony of a consulting engineer, tacitly corroborated by petitioner's railroad signal experts, that it was feasible, simple and practical to provide key switches by which respondent could have activated the signals and received the benefits of that system of warning?

2. Whether the issue of sole negligence passed out of this case when the jury found that petitioner's negligence in failing to furnish warning devices played a part in producing respondent's injuries?

STATEMENT OF FACTS.

Petitioner's "Statement" is substantially correct except that it makes four omissions which we deem significant.

Omission No. 1.

At page 4 of its Petition for Writ of Certiorari, petitioner mentions respondent's allegation that petitioner insulated the motor car so as to prevent it from activating protective electric signals at the crossing. The following has been omitted:

> Petitioner specifically admitted in its amended answer that on the date of respondent's injury and prior thereto, petitioner had established, and was operating and maintaining at the public crossing in question, protective electric signal devices, which were activated by the presence of railroad trains on the tracks, for the purpose of warning motorists of the presence and danger of railroad trains approaching or passing over the public crossing, and for the purpose of preventing collisions between railroad equipment and private automobiles (R. 3, 5, 132).
>
> The protective signals consist of poles at the northeast and southwest corners of the intersection, each bearing a pair of red flasher lights, a bell, and a sign, facing oncoming traffic, proclaiming "Railroad Crossing," and below, "Stop on Red Signal" (R. 12). When a train approaches, a bell rings and the red lights flash and continue to do so until the rear of the train has passed over the crossing (R. 12, 120, 152, 167).
>
> Petitioner further specifically admitted that it insulated the motor car so as to prevent it from activating electric signal devices at public crossings (R. 5).

Omission No. 2.

At page 5, petitioner states that the automobile driver did not see the motor car before the collision. The following has been omitted:

> The motorist, who was thoroughly familiar with the protective electric signals and their manner of operation (R. 12, 13, 19, 21, 32) fixed his eyes on the signal as he approached the crossing to see whether the flasher lights were going to come on (R. 12).
>
> Having thus fixed his eyes on the signals for the aforesaid purpose, he at no time looked to the right or to the left or in any direction except at the signal (R. 13, 18, 19, 21, 23). At no time before the collision did the protective electric signal operate (R. 12, 27). The motorist never saw the motor car before he struck it because he was continually looking at the electric signal (R. 13, 21, 26, 27).

Omission No. 3.

At page 6, petitioner states that John Bland [who is a university-educated professional engineer (R. 118, 119, 121)], testified that he would not qualify in general railroad practice. The following has been omitted:

> Mr. Bland testified that although he had never been employed by a railroad (he had worked with industry to put railroad crossings and tracks onto railroad company lines), he considered himself, as a trained and experienced engineer, qualified to render an opinion as to the practicality of using such a simple and elementary device as he had suggested (R. 121, 123).

Omission No. 4.

At page 6, petitioner states that John Bland testified that he had seen only one key switch—at a Missouri Pa-

cific crossing in St. Louis, and that the evidence showed the signal only operates at that crossing when a railroad car is in the circuit. The following has been omitted:

—Mr. Bland testified that in addition to the Missouri Pacific Railroad Company key switch mentioned, he had seen a push-button switch used by the Frisco Railway Company at crossings in St. Louis, Missouri (R. 123).

Petitioner's witness, A. T. Hunot, the assistant signal engineer for the Missouri Pacific Railroad Company, admitted that his railroad has key switches in use at four crossings in the City of St. Louis, which operate electric signals very similar to the one here involved (R. 141, 142, 145). He explained that the key switches at the Missouri Pacific crossings are designated to permit the train crew to turn off the signals when a car is occupying a section of the track which activates the signal (R. 141, 142). They operate only when a railroad car is within a certain range of the crossing because the system is set up in a certain manner for an express purpose (R. 146, 147). Mr. Hunot testified it is feasible to have signal switches operated manually by a key (R. 147).

L. E. Shannon, a communication and signal maintenance supervisor for the Frisco Railway Company, testified for petitioner that the Frisco has push-button switches at eight crossings in St. Louis, which operate signals practically the same as those in question (R. 148, 150). The switches are designed to permit switchmen to control the operation of the signals (R. 148, 150). When there is no railroad car within the switching circuit the switchman must keep his finger on the button to continue the operation of the signal (R. 148, 149, 150). However, this is arranged for the particular purpose of the Frisco, and the signals could be wired so that an employee would not have to keep

his finger on the button to continue the operation of the signal (R. 150, 151).

Neither Mr. Hunot nor Mr. Shannon nor L. B. Yarbrough, defendant's assistant superintendent of signals and communications, indicated that the system suggested by Mr. Bland would be impractical or would interfere with the normal operation of the railroad. Mr. Hunot was asked about this specifically and stated he had no opinion whether the installation of manual switches, as suggested by Mr. Bland, would be good railroad practice (R. 147).

ARGUMENT.

Under the Rules of this Court (Revised Rules of the Supreme Court of the United States, Rule 49), petitioner is not entitled to a Writ of Certiorari unless it can demonstrate that the decision of the Supreme Court of Missouri is not in accord with applicable decisions of this Court. This petitioner cannot do. The Supreme Court of Missouri has, in this case, placed itself in complete accord with the most recent and controlling decisions of this Court. Rogers v. Missouri Pacific R. Co. (1957), 352 U. S. 500, 1 L. Ed. 2d 493, 77 S. Ct. 443; Smalls v. Atlantic Coast Line R. Co. (1955), 348 U. S. 946, 99 L. Ed. 740, 75 S. Ct. 439; Cahill v. New York, New Haven & Hartford R. Co. (1955), 350 U. S. 898, 100 L. Ed. 790, 76 S. Ct. 180; Shaw v. Atlantic Coast Line R. Co. and Southern Ry. Co. (1957), 353 U. S. 920, 1 L. Ed. 2d 718, 77 S. Ct. 680; Arnold v. Panhandle & S. F. R. Co. (1957), 353 U. S. 360, 1 L. Ed. 2d 889, 77 S. Ct. 840; Ferguson v. St. Louis-S. F. R. Co. (1958), 356 U. S. 41, 2 L. Ed 2d 571, 78 S. Ct. 671.

The evidence in this case, as set forth heretofore in the "Statement" emphatically establishes the correctness of the decision below, that the proofs were sufficient to submit to the jury the question whether employer negligence played a part in producing the respondent's injury.

Throughout this case petitioner has never been able to dispute the fact that the crossing where respondent was injured was dangerous in that there existed the likelihood of collision between pr ate automobiles and railroad equipment; that petitioner operated and maintained the electric signalling devices there for the very purpose of preventing just such collisions; and that petitioner insulated respondent's motor car so as to prevent it from activating these signalling devices. All these facts were solemnly admit d by petitioner in its amended answer

(R. 3, 5). These admitted facts make it plain that petitioner created and maintained for its own purposes, a situation where respondent, by the insulation of his motor car, was not only stripped of the protection of the warning signals but the crossing was made more dangerous by the presence of the "Stop on Red Signal" signs which lulled the public into a false sense of security. Under these circumstances, it was the non-delegable duty of petitioner to use reasonable care in furnishing employees a safe place and method of work—a continuing duty "from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent" (Bailey v. Central Vermont R. Co. [1943], 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062). Consistent with this duty, petitioner should have furnished respondent some means of activating the crossing signals.

Respondent's witness John Bland, a trained and experienced consulting engineer (R. 119, 121), testified, that, without any changes in the existing arrangement of signals, a simple switch could be installed on both sides of the street to permit a man on a motor car to activate the signals on one side and turn them off on the other (R. 120, 121).

The usefulness, simplicity, and practicality of such switches is made even more apparent by the fact that devices of the same nature are now in use by other railroads (R. 121, 122, 124). Petitioner's evidence that the switches used by other railroads are employed for somewhat different purposes (R. 142, 150) and that the switches are turned on in a different manner (R. 141, 148) goes only to the application of the method and does not detract from its feasibility. In fact, petitioner's evidence demonstrates the flexibility of the use of this type of device. It is almost a matter of common knowledge that similar devices are used in every large city in this country to protect pedestrians from unusual traffic hazards.

Petitioner has pivoted its attack on Mr. Bland's testimony upon his statement that he had never been consulted by a railroad and "would not qualify in general railroad practice" (R. 123). Petitioner has made a special point of calling this to the Court's attention (Petition for Writ of Certiorari, pages 2, 6), but has not once seen fit to advise the Court that Mr. Bland expressly testified that the electric switch suggested by him is a "simple and elementary device" upon which any engineer "would be qualified to render an opinion" and that he felt qualified to do so (R. 123).

The real answer to petitioner's charge that Mr. Bland's testimony lacks probative value because he has never been employed or consulted by a railroad, is the answer supplied by the Supreme Court of Missouri, below: "Such matters are not exclusively within the knowledge of an engineer experienced in railroad construction." 315 S. W. 2d 765, l. c. 772. This, incidentaly, is the same answer supplied by the State Court when this point was raised in an earlier matter where the same counsel were involved. Tatum v. Gulf, M. & O. R. Co. (1949), 359 Mo. 709, 223 S. W. 2d 418. Railroad engineers have no monopoly on the knowledge that a switch to turn on a warning signal on one side of an intersection and another to turn it off at the opposite side is a simple and workable means of avoiding the danger to be encountered while crossing an intersection. An average layman who is neither an expert or a genius is familiar with similar signal switches at pedestrian street crossings, whereby a red light is activated to halt traffic when he crosses the street. And it does not require railroad experience to transfer this same principle to a railroad crossing such as that with which we are here concerned.

It is highly significant that not one of petitioner's railroad signal experts testified that a manual switch on each side of the crossing would be impractical or would inter-

fere with normal railroad operations. On the contrary, one (Mr. A. T. Hunot) testified that such a system was feasible (R. 147); another (Mr. L. E. Shannon) testified that it is simply a matter of wiring the signal mechanism to achieve the desired results (R. 150, 151).

The sufficiency of Mr. Bland's testimony to permit a jury to find that petitioner was negligent in failing to furnish devices for respondent's protection, is emphasized when considered with the testimony of the automobile driver. Feneley Pope's testimony indicated that he considered, as he had the right to consider, the "Stop on Red Signal" sign as nothing less than an invitation to proceed without fear of collision when there was no red signal. Being familiar with the signal's manner of operation, he fixed his eyes upon the signal and relied entirely upon it and looked in no other direction, and as a consequence did not see the motor car until after the collision (R. 12, 13, 18, 19, 21, 23).

Under the principles so clearly and specifically enunciated in Rogers v. Missouri Pacific R. Co., supra, and adhered to by this Court both before and after the Rogers decision, this evidence was clearly sufficient to justify with reason the jury's conclusion that employer negligence played a part in producing respondent's injury. And the Supreme Court of Missouri correctly so held. This was the only question, concerning submissibility, which was before the Supreme Court of Missouri. The issue was not, as petitioner insinuates, whether it would seem more reasonable to say that the accident was caused by the negligence of respondent. Rather, the Supreme Court of Missouri in accord with the decisions of this Court was limited to inquiring whether reasonable men could disagree as to whether petitioner's failure to provide respondent with appliances or devices with which to warn motorists amounted to negligence and whether this negligence played "any part at all in the injury." Rogers v.

Missouri Pacific R. Co., supra, 352 U. S. 500, l. c. 507; Wilkerson v. McCarthy (1949), 336 U. S. 53, 93 L. Ed. 497, 69 S. Ct. 413; Lavender v. Kurn (1946), 327 U. S. 645, 90 L. Ed. 916, 66 S. Ct. 740; Smalls v. Atlantic Coast Line R. Co., supra; Cahill v. New York, New Haven and Hartford R. Co., supra; Shaw v. Atlantic Coast Line R. Co. and Southern Ry. Co., supra; Arnold v. Panhandle & S. F. R. Co., supra.

Smalls v. Atlantic Coast Line R. Co., supra, was a case instituted by several employees of defendant who were struck by a third party's automobile while they were waiting at an unlighted crossing to board one of defendant's trains. The train was to take them to a company safety meeting to which the company had invited them, though attendance was not compulsory. Employees who attended the meeting were not to be compensated for their time.

Judgment for plaintiffs was reversed by the Court of Appeals for the Fourth Circuit which stated that there was no evidence of negligence on the part of the company. Atlantic Coast Line R. Co. v. Smalls (4th Cir., 1954), 216 F. 2d 842, l. c. 844.

Without opinion, this Court granted the petition for writ of certiorari and summarily reversed the judgment of the Court of Appeals, thus reinstating the judgment on the verdict for the plaintiffs.

In Cahill v. New York, New Haven & Hartford R. Co., supra, the plaintiff was hit by a motor truck while flagging traffic at a highway crossing in order to protect a freight train which had stopped, blocking the crossing. The truck, which had previously come to a stop, started up without warning, striking him and throwing him against the coupling of the rear railroad car.

The Court of Appeals for the Second Circuit held that the trial court erred in not granting defendant's motions for a directed verdict and for judgment notwithstanding the verdict. 224 F. 2d 637. The reasoning, upon which

this decision was based, was to the effect that the sole cause of plaintiff's injury was the negligence of the truck driver over whom the railroad had no control. The Court of Appeals further held that the negligence of the defendant railroad company, if any, was merely a condition and not a cause, in the legal sense, of plaintiff's injuries.

Certiorari was granted by this Court which reversed, without formal opinion, the judgment of the Court of Appeals thereby reinstating the verdict and judgment of the trial court.

Shaw v. Atlantic Coast Line R. Co. and Southern Ry. Co., supra, was instituted by the executor of the estate of a Southern Railway conductor who was killed by an Atlantic Coast Line train as he attempted to run across the tracks in front of the approaching locomotive. At the time of the accident, the conductor was crossing the tracks on his way to the station to deliver mail as well as to get clearance orders from the station master so that his train could proceed. There was a great deal of testimony tending to show his actual knowledge of the immediate danger and his actions in the face thereof, from which contributory negligence could be infered.

His employer was sued under the Federal Employers' Liability Act and the cause of action against the third party (Atlantic Coast Line Railroad Company) was bottomed on common law negligence. At the conclusion of defendants' evidence, motions for directed verdict were granted in favor of both defendants.

Following affirmance by the Court of Appeals for the Fourth Circuit, 238 F. 2d 525, this Court granted certiorari, limiting its order to that part of the judgment in favor of the defendant employer, and thereupon reversed that part of the judgment and remanded it for trial.

In Arnold v. Panhandle & S. F. R. Co., supra, plaintiff, a car inspector for defendant railroad, was working in

a narrow gravel passageway on the railroad's property when a truck owned by a third party backed into the passageway and struck him. The Texas Court of Civil Appeals reasoned that it was not negligence for the defendant railroad to allow the truck to enter the general area; and, therefore, the place provided for the plaintiff to work was not unsafe. The negligence of the truck driver along with that of the plaintiff was held to be the sole proximate cause of plaintiff's injuries. The Texas Court further held that there was a conflict between the general verdict for plaintiff and the special findings for defendant, whereupon it reversed the judgment of the trial court. Panhandle & Santa Fe Ry. Co. v. Arnold (Tex., 1955), 283 S. W. 2d 303.

This Court, on certiorari, reversed the judgment in a per curiam opinion holding "that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing petitioner's injury." 353 U. S. 390.

The Smalls, Cahill, Shaw and Arnold cases, which are among the most recent expressions of the law by this Court, and which involve factual situations analogous to that herein, were recited and relied upon by the Missouri Supreme Court in this case and these cases dispose of petitioner's contention that it was not negligent and that the sole cause of respondent's injuries was negligence on his own part.

In each of the above cases, the issue of sole cause played an important part in the action of the inferior court. For example, it was said: "the sole cause of his injury was the negligence of the truck driver," Cahill v. New York, New Haven & Hartford R. Co., 224 F. 2d 637, l. c. 639; "their injuries resulted, not from any negligence of the company, but from their own negligence or the negligence of a third person," Atlantic Coast Line R. Co. v. Smalls, 216 F. 2d

842, l. c. 844; "his death was not due to the great speed of the train but to his own voluntary act," Shaw v. Atlantic Coast Line R. Co., 238 F. 2d 525, l. c. 528; ". . . appellee's failure to keep a proper lookout necessarily becomes the sole proximate cause of his injuries and he cannot recover . . .", Panhandle & Santa Fe Ry. Co. v. Arnold, 283 S. W. 2d 303, l. c. 304. Yet, this Court held, as a matter of law, in each of the four cases, that a jury could justifiably conclude that employer negligence played a part in producing the injury.

And when a jury finds that employer negligence played **any part at all, even the slightest,** in causing the injuries, and that finding is supported by evidence, the defense that the sole cause of the injuries was some negligence other than employer's is necessarily thereby precluded.

In the case at bar, the jury was instructed to return a verdict for petitioner if it found that negligence of the respondent, or the negligence of the automobile operator, or the combined negligence of both, was the sole cause of respondent's injuries (R. 176, 178). It follows that the jury found that respondent's injury resulted at least in part from petitioner's negligence. When it so found, the defense of sole cause went out of the case because the very concept of the defense of sole cause is diametrically opposed to any suggestion of causal negligence on the part of the petitioner.

Whether the jury could, under the evidence, have arrived at some other conclusion is an immaterial and improper consideration at this time, since the evidence viewed in the light most favorable to respondent (Wilkerson v. McCarthy, supra, 336 U. S. 53, l. c. 57), supports the finding that petitioner's negligence contributed in some part to the causation of respondent's injuries. Rogers v. Missouri Pacific R. Co., supra.

CONCLUSION.

Respondent respectfully submits that the facts of this case, as set forth herein, establish that the decision of the Supreme Court of Missouri is manifestly correct and is in complete accord with the decisions of this Court in holding that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing respondent's injuries.

Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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